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AT SEATTLE
CLERK U.S. DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
DEPIJIV

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

VET BUOT,

Petitioner,

CASE NO C03-0289L

v

JOHN D ASHCROFT, *et al* ,

Respondents

REPORT AND
RECOMMENDATION
RE: INDEFINITE DETENTION

INTRODUCTION

Petitioner is a native and citizen of Cambodia who is being detained by the Immigration and Naturalization Service ("INS") pursuant to an order of removal to that country that became final on June 3, 1996¹ (See Dkt. #8 at 3). On February 18, 2003, he filed a Petition for Writ of Habeas Corpus under 28 U S C. § 2241, which challenges, *inter alia*, the constitutional and statutory authority of the INS to detain him any further, due to the unlikelihood of his removal from this country in the reasonably foreseeable future (Dkt #3). His petition is one of several that have been filed in this Court over the last three years that raise the same common legal

¹ Pursuant to the Homeland Security Act of 2002, 116 Stat. 2135, Pub L. 107-296, *codified at* 6 U S C § § 101, *et seq* , alien detention, deportation, and removal functions were transferred from the Department of Justice to the Department of Homeland Security ("DHS") on March 1, 2003. 6 U S C. § 251 (2002) Within the DHS, the former Immigration and Naturalization Service ("INS") was reorganized into three bureaus serving separate functions. The BICE is responsible for deportations and investigations. Because petitioner's case was filed prior to the reorganization, however, the Court will reference both the INS and the BICE within this R&R.

1 from this country in the reasonably foreseeable future (Dkt #3) His petition is one of several
2 that have been filed in this Court over the last three years that raise the same common legal
3 issues regarding indefinite detention by the INS

4 On July 9, 1999, this Court, in a Joint Order involving five "lead" cases, ruled that
5 indefinite detention violated substantive due process *See Phan v Reno*, 56 F Supp 2d 1149
6 (W D Wash 1999) The Ninth Circuit Court of Appeals in *Ma v Reno*, 208 F 3d 815 (9th Cir
7 2000) (subsequent history omitted), affirmed the Joint Order, but on different grounds The
8 Court determined that the INS lacked the statutory authority to detain deportable aliens beyond
9 a ninety (90) day removal period if there was no reasonable likelihood of removal in the
10 foreseeable future

11 In *Zadvydas v Davis*, 121 S Ct 2491 (2001), the United States Supreme Court
12 affirmed *Ma's* general holding that indefinite detention is unauthorized The Court stated that
13 "in light of the Constitution's demands, an alien's post-removal-period detention [is limited]
14 to a period reasonably necessary to bring about the alien's removal from the United States "
15 *Zadvydas*, 121 S Ct at 2498 The Court, however, adopted a "presumptively reasonable
16 period of detention" of six months *Id* at 2504-05

17 Petitioner's case falls into the *Ma/Zadvydas* group of indefinite detention cases Having
18 reviewed the entire record, including the habeas petition (Dkt #3), respondents' return and
19 status report and motion to dismiss (Dkt #8), petitioner's response (Dkt #10) and the INS
20 administrative record (Dkt #9), I recommend that the Court GRANT petitioner's habeas
21 petition and order his release immediately, on conditions to be set by the INS Such conditions
22 may include those set forth in 8 C F R § 241 5(a)

23 **BACKGROUND**

24 Petitioner Vet Buot was born in Cambodia on February 1, 1969 (Dkt #9 at R018) On
25 November 15, 1983, he entered the United States as a refugee at San Francisco, California
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1 (Dkt #9 at R016 and R018) Petitioner left Cambodia without a passport or any official exit
2 visa issued by the government of Cambodia (Dkt #10 at 3) On June 19, 1986, petitioner
3 adjusted his status to lawful permanent resident, which applied retroactively to his date of entry
4 pursuant to INA § 209 (Dkt #9 at R018 and R026)

5 On or about May 14, 1995, petitioner was arrested for striking a man in the head with an
6 axe (Dkt #9 at L015-17) On July 7, 1995, petitioner was convicted in King County Superior
7 Court of assault in the first degree (Dkt #9 at L012-14) He was sentenced to 105 months in
8 prison, followed by 24 months of community supervision (Dkt #9 at L09 and L012-14) On
9 July 11, 1995, the INS encountered petitioner at the Washington State Corrections Center in
10 Shelton, Washington, where he was serving his sentence for the assault conviction (Dkt #9 at
11 R018) Petitioner waived his *Miranda* rights by signing a written waiver, and was interviewed by
12 an INS official (Dkt #9 at R014)

13 On July 25, 1995, the INS issued an Order to Show Cause and Notice of Hearing,
14 alleging removability pursuant to INA § 242, in that petitioner had been convicted of an
15 aggravated felony for which the sentence imposed was one year or greater (Dkt #9 at R025-
16 26)

17 On December 7, 1995, petitioner's initial removal proceedings were held before a Seattle
18 Immigration Judge ("IJ") at the Washington State Penitentiary in Walla Walla, Washington,
19 while he was still in state custody (Dkt #9 at L001-04) At the proceedings, petitioner admitted
20 the allegations of fact and conceded removability as charged by the INS (*See* Dkt #9 at L022)
21 At the same time, petitioner requested relief from removal pursuant to INA § 212(c) (*See* Dkt
22 #9 at L022) On April 24, 1996, petitioner submitted Form I-191 in support of his request for
23 relief (Dkt #9 at R022-23 and L022)

24 On May 13, 1996, petitioner's removal proceedings continued in Seattle Immigration
25 Court (Dkt #9 at L018-23) At that time, the IJ pretermitted petitioner's request for relief under
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1 INA § 212(c), and ordered petitioner removed to Cambodia (Dkt #9 at L026-27) The IJ
2 advised petitioner of his right to appeal to the Board of Immigration Appeals ("BIA") on or
3 before June 3, 1996 (Dkt #9 at L028) Petitioner did not appeal the decision Thus, his order of
4 deportation became administratively final on June 3, 1996 *See* 8 C F R § 241 1(b)

5 On July 19, 1996, while petitioner was still serving his state sentence, the INS requested
6 travel documents from the Consulate General of Cambodia (Dkt #9 at L029) On August 5,
7 1996, the Cambodian government notified the INS that it was not authorized to issue travel
8 documents for petitioner (Dkt #9 at L030) No further attempts to obtain travel documents
9 were made at that time

10 After petitioner completed his state sentence, he was taken into INS custody on October
11 17, 2002 (*See* Dkt #9 at L033) Petitioner was notified by letter dated December 17, 2002, that
12 his custody status would be reviewed on or about January 15, 2003 (Dkt #9 at R033) The
13 notice letter also advised petitioner that he could submit any documentation in support of his
14 release from custody (Dkt #9 at R033) Apparently, petitioner chose not to do so (*See* Dkt #9
15 at R035)

16 On February 4, 2003, the INS conducted a custody status review of petitioner (Dkt #9
17 at R039) On the same date, the INS issued its decision to continue petitioner's detention (Dkt
18 #9 at R041) Petitioner was advised that control of his custody case would be transferred to the
19 INS Headquarters Post Order Detention Unit ("HQPDU") for further review (Dkt #9 at R041)

20 On February 7, 2003, the INS made its second request for travel documents to the
21 Consulate General of Cambodia (Dkt #9 at R030-31) Although the United States and
22 Cambodia currently have a signed repatriation agreement (*see* Dkt #8, Exhibit A), the
23 Cambodian government has not responded to the INS request for travel documents as of this
24 date (Dkt #8 at 4)

25 Petitioner filed the instant habeas petition on February 10, 2003 (Dkt #3) On February
26

1 28, 2003, the HQPDU conducted a custody status review of petitioner and issued its decision to
2 continue petitioner's detention, based primarily on its belief that Cambodia will actually issue
3 travel documents at some point in the reasonably foreseeable future (Dkt #9 at R043)
4 Respondents filed their return to the petition on March 17, 2003, along with a motion to dismiss
5 (Dkt #8) Petitioner filed a response to the return on March 26, 2003 (Dkt #10) The petition
6 is now ripe for review

7 DISCUSSION

8 In *Zadvydas, supra*, the Supreme Court held that the applicable INS post-final removal
9 order detention statute, 8 U S C § 1231(a)(6), when "read in light of the Constitution's
10 demands, limit[ed] an alien's post-removal-period detention to a period reasonably necessary to
11 bring about the alien's removal from the United States " *Zadvydas*, 121 S Ct at 2498 The
12 Court stated that a "habeas court must [first] ask whether the detention in question exceeds a
13 period reasonably necessary to secure removal " *Id* at 2504 If a petitioner's removal is not
14 reasonably foreseeable, "the court should hold continued detention unreasonable and no longer
15 authorized by statute " *Id*

16 In determining what is a reasonable removal period, the Court adopted "for the sake of
17 uniform administration in the federal courts," *id* at 2505, a "presumptively reasonable period of
18 detention" of six months *Id* at 2504 "After this 6-month period, once the alien provides good
19 reason to believe that there is no significant likelihood of removal in the reasonably foreseeable
20 future, the Government must respond with evidence sufficient to rebut that showing " *Id*

21 As to what counts as "the reasonably foreseeable future," the Court stated that as the
22 period of confinement grows, the period that is "the reasonably foreseeable future" must shrink
23 *Id* As to the meaning of the phrase "significant likelihood of removal," the Court rejected the
24 Fifth Circuit's requirement that a detainee show *no* likelihood of removal, and also rejected the
25 Ninth Circuit's apparent reliance on the lack of a repatriation agreement to meet the standard
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1 *Id* Instead of either of these approaches, the Court suggested that a particularized inquiry is
2 required in each case, and further counseled that a habeas court should “listen with care” when
3 the executive branch’s foreign policy expertise is involved *Id*

4 Respondents argue that petitioner has failed to meet his burden of showing that it is
5 unlikely the INS will be able to effect his removal in the reasonably foreseeable future (Dkt #8
6 at 5) Respondents support this argument by asserting that “based upon the agreement between
7 the United States and Cambodia, [petitioner]’s repatriation to Cambodia is highly probable ”²
8 (Dkt #8 at 4) Respondents also assert that it is likely the necessary travel documents will be
9 issued by the Cambodian government in the reasonably foreseeable future “based upon recent
10 success that the INS has had in repatriating Cambodian nationals ” (Dkt #8 at 4)

11 Petitioner recognizes that a repatriation agreement now exists between the United States
12 and Cambodia, but argues that there is no indication that the Cambodian government is likely to
13 issue travel documents in the reasonably foreseeable future (Dkt #10 at 5-6) Petitioner further
14 argues that the removal of an alien to Cambodia could take several months, if not years – given
15 that there are presently over 1,000 Cambodians in the United States with finals orders of
16 removal (Dkt #10 at 6) To support this claim, petitioner notes that Cambodia has never
17 accepted deportees at a rate of greater than 10 per month during the first year of the repatriation
18 agreement (Dkt #10 at 6) Petitioner argues that the current rate of acceptance of deportees
19 “represents a potential backlog of 100 months – over 8 years ” (Dkt #10 at 6 n 6)

20 The Court is persuaded by petitioner’s argument Petitioner has shown that, as of this
21 date, the Cambodian government has not responded to the BICE’s most recent request for travel
22 documents According to the repatriation agreement, the Cambodian Central Authority is

23
24 ² Respondents also argue that petitioner’s six-month detention period has not yet expired, and
25 therefore petitioner’s detention is lawful (Dkt #8 at 5) While it is true that at the time of filing petitioner
26 had not yet been in custody for six months, he remains in custody as of this date, and will have been
detained for six months as of April 17, 2003, approximately the same time that this Report and
Recommendation will be ready for review by the District Court

1 generally supposed to respond to a repatriation request in writing within 30 days of the request
2 (Dkt #8, Exhibit A at 2) More than 60 days has passed since the BICE requested travel
3 documents on February 17, 2003 In addition, respondents have given no indication as to
4 whether any further efforts have been made to obtain travel documents since their initial effort
5 The government's bald statement that petitioner is likely to be removed in the reasonably
6 foreseeable future because there is now a repatriation agreement fails to provide sufficient
7 evidence to rebut petitioner's allegations that removal is not likely in the reasonably foreseeable
8 future To comply with the Supreme Court's instruction in *Zadvydas*, the government must
9 provide a more particularized showing

10 Moreover, the Court distinguishes petitioner's case from that of a recent petitioner also
11 subject to removal to Cambodia (*See Tan v INS, et al*, Case No C02-0122L) In *Tan*,
12 petitioner had been ordered removed, and the INS had requested travel documents pursuant to
13 the new repatriation agreement Unlike in the current case, however, the Cambodian government
14 responded to the government's request, deciding to interview petitioner Tan with a number of
15 other possible deportees (Case No C02-0122L, Dkt #19 at 2) This Court then determined
16 that

17 petitioner's individualized consideration by the Cambodian government, the
18 successful deportation of a number of Cambodian nationals, the relatively short
19 period of time the repatriation has been in effect, and the unsurprising fact that
20 it will take some time to repatriate all of the potential deportees who remain
21 in the country, [demonstrate] there is a reasonable likelihood that petitioner
22 will be repatriated in the reasonably foreseeable future

23 (Case No C02-0122L, Dkt #19 at 3) Petitioner Tan has since been removed (Case No C02-
24 0122L, Dkt #20)

25 In the instant action, the Cambodian Central Authority has failed to respond to the INS
26 for more than 60 days (Dkt #8 at 4) There has been no individualized consideration of
petitioner's case by the Cambodian government, and respondents have indicated no reasonable
time period in which removal is likely to occur Accordingly, I find that petitioner has shown that

1 there is no significant likelihood of his removal in the reasonably foreseeable future


2 Finally, respondents also suggest that both petitioner's criminal history and his failure to
3 comply with prior court orders grant them the authority to detain him beyond the removal period,
4 pursuant to INA § 241 4(a)(4) (Dkt #8 at 5-6) However, petitioner's criminal history does not
5 factor into the *Zadvydas* analysis In *Zadvydas*, the Court emphasized that INS proceedings are
6 civil, not criminal, and thus nonpunitive in purpose and effect *Zadvydas*, 121 S Ct at 2499
7 Therefore, preventive detention based on dangerousness can be upheld "only when limited to
8 specially dangerous individuals and subject to strong procedural protections " *Id* The Court
9 explained that when preventive detention is of potentially indefinite duration, as petitioner alleges
10 here, the dangerousness rationale must be accompanied by some other special circumstance *Id*
11 The Court noted that "once the flight risk justification evaporates, the only special circumstance
12 present is the alien's removable status itself, which bears no relation to a detainee's
13 dangerousness " *Id* While this Court acknowledges the seriousness of petitioner's assault
14 conviction, it appears that the Supreme Court would not consider petitioner's criminal history,
15 without more, to be the sole basis for his continued detention Therefore, the Court is not
16 persuaded by respondents' argument

17 CONCLUSION

18 Based on the foregoing, the Court should GRANT petitioner's Petition for Writ of
19 Habeas Corpus and should order petitioner's release on conditions Such conditions may include
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those set forth in 8 C F R § 241 5(a) A proposed order accompanies this Report and
Recommendation³

DATED this 21 day of April, 2003


RICARDO S MARTINEZ
United States Magistrate Judge

³ In light of the nature of the case, and the court's direction to expedite it in every way possible, this court has shortened the usual time for objections and other responses to this Report and Recommendation (See cover letter attached to this Report and Recommendation)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

CHAMBERS OF
RICARDO S. MARTINEZ
UNITED STATES MAGISTRATE JUDGE

UNITED STATES COURTHOUSE
1010 FIFTH AVE
SEATTLE, WA 98104
(206) 553-1396

April 21, 2003

TO Jay Warren Stansell, Counsel for Petitioner
Christopher L. Pickrell, Counsel for Respondent

FILED
APR 21 2003

FROM RICARDO S. MARTINEZ
U.S. Magistrate Judge

APR 21 2003
CLERK U.S. DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
BY

RE Buot v. Ashcroft, et al.
Case No. C03-289L

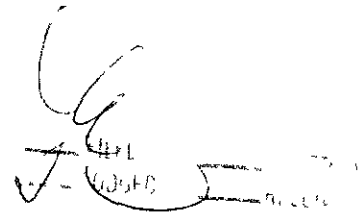
Enclosed are copies of my Report and Recommendation and proposed order and proposed judgment in the above-captioned case. The originals are being filed with the Clerk. This Report and Recommendation is not an appealable order. Any notice of appeal should not be filed until the District Judge enters judgment in this case.

Because the court has ordered expedited consideration of these cases, we are directing responses to the Report and Recommendation more quickly than would otherwise be provided under the rules. Objections to the recommendation should be filed and served within seven calendar days of the date of this letter with copies to the Clerk for forwarding to the District Judge and to my office. You should note your objections for consideration on the Judge's motion calendar for the second Friday after they are filed. If no timely objections are filed, the matter will be ready for consideration by the District Judge on May 2, 2003.

Thank you for your cooperation.

Attachments
RSM/csm

cc. Hon. Robert S. Lasnik


APR 21 2003
LEHR S. F. V. L. - JUDGE
WESTERN DISTRICT OF WASHINGTON
BY

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

VET BUOT,

Petitioner,

v

JOHN D ASHCROFT, *et al* ,

Respondents

CASE NO C03-0289L

ORDER GRANTING PETITION FOR
WRIT OF HABEAS CORPUS

The Court, having reviewed the Petition for Writ of Habeas Corpus, the Report and Recommendation of the Honorable Ricardo S Martinez, United States Magistrate Judge, and any objections or responses to that, and the remaining record, finds and Orders as follows

- (1) The Court adopts the Report and Recommendation,
- (2) The Court finds that petitioner's detention after the expiration of the six-month period is statutorily unauthorized under *Zadvydas v Davis*, 121 S Ct 2491 (2001),
- (3) Respondents' Motion to Dismiss (Dkt #8) is DENIED,
- (4) The Petition for Writ of Habeas Corpus (Dkt #3) is GRANTED;
- (5) Petitioner shall be released from INS custody within two business days after entry

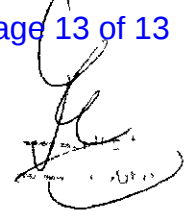
1 of this Order, on conditions set by the INS which may include those set forth in 8
2 C F R § 241 5(a), and

3 (6) The Clerk shall send a copy of this Order to all counsel of record, and to the
4 Honorable Ricardo S Martinez

5 DATED this ____ day of _____, 2003
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8 ROBERT S LASNIK
9 United States District Judge
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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE


APR 21 2003

CLERK OF COURT
WESTERN DISTRICT OF WASHINGTON
DEPUTY

VET BUOT,

Petitioner,

v

JOHN D ASHCROFT, et al ,

Respondent.

CASE NO C03-289L

JUDGMENT IN A CIVIL ACTION

☐

Jury Verdict. This action came before the Court for a trial by jury The issues have been tried and the jury has rendered its verdict

☒

Decision by the Court. This action came under consideration before the Court The issues have been considered and a decision has been rendered

IT IS ORDERED AND ADJUDGED the Report and Recommendation is adopted and approved and the petition for Writ of Habeas Corpus is GRANTED

Date: _____

Bruce Rifkin
Clerk of Court

(by) Deputy Clerk